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No. 04-631

Supreme Court, U.S.
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In The Supreme Court of the United States

STEPHEN RICHARDS, in his official capacity as Secretary, Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF SOUTH DAKOTA, ALASKA, CALIFORNIA, CONNECTICUT, IDAHO, MICHIGAN, MISSOURI, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, UTAH AND WYOMING *AS AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amici States pursue a modest goal: The preservation of the bright-line rule which protects state authority outside of Indian country except where it is expressly preempted by Congress. The maintenance of "bright-line" rules is of such great importance that eleven states, including some of those who have joined in the present brief, actually opposed their sister state in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995), when the sister state sought to substitute a fuzzy "economic reality" test regarding certain jurisdictional matters in place of a bright-line "legal incidence" test. A bright-line rule avoids divisive litigation between the states and the tribes and promotes harmony among them. Moreover, the existing bright-line rule prevents the intrusion of federal courts into the day-to-day management of the states, consistent with this Court's, and the States' understanding of the Constitution.

SUMMARY OF ARGUMENT

This Court has consistently held that "absent express federal law to the contrary," an Indian or Indian tribe going beyond reservation boundaries is subject to non-discriminatory state law. This doctrinal approach is based on a sturdy foundation of fact and history: Tribes have no tradition of tribal sovereignty off reservation, and therefore there is no reason that the special, on reservation, balancing test should be applied off reservation. By ignoring this well established principle of law and by further ignoring the basis on which it was established, the Tenth Circuit committed serious error.

The decision below should be reversed not only because its potential effects on the ability of a state to tax off reservation events, but because the principle underlying the decision will be and indeed is already being applied to off reservation non-tax controversies. Under the Tenth Circuit approach, any state statute or regulation which is alleged to interfere, off reservation, with a tribal interest or ordinance may be reviewed under the nuanced test of *White Mountain Apache Tribe*. This allows the federal court, in the words of the Tenth Circuit, to balance the "normative values" at issue to determine the validity of any state statute or regulation when applied off reservation.

The decision below allows the federal courts the power to review the day-to-day sovereign actions of the states off reservation. Such an extension of power is unjustified and should be rejected by this Court.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT SIGNIFICANTLY DEVALUES THE TERRITORIAL COMPONENT OF LEGITIMATE PREEMPTION ANALYSIS.

This case concerns the question of when otherwise legitimate state laws are preempted off reservation by the operation of federal law for reasons relating to tribal sovereignty. Prior to the decision below, it has always been understood that different tests would apply on and off reservation. On reservation, a nuanced, and often difficult to apply, interest balancing test has been applicable. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145

(1980). *See Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 176-77 (1989). Off reservation, however, this Court has consistently found that interest balancing did not apply, and that "'Indians going beyond reservation boundaries'" are subject to "'nondiscriminatory state law'" in the absence of "'express federal law to the contrary.'" *White Mountain Apache Tribe*, 488 U.S. at 144 n.11 (*quoting Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)).

The rationale for the application of the differing tests is apparent: The interest balancing test was believed justified to accommodate the "tradition of Indian sovereignty over the reservation and tribal members." *White Mountain Apache Tribe*, 448 U.S. at 143. This has flowed from the Court's recognition that there is a "significant territorial component to tribal power." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982). For example, in *Atkinson Training Company v. Shirley*, 532 U.S. 645, 653 (2001), this Court found that an "Indian tribe's sovereign power to tax – whatever its derivation – reaches no further then tribal land." In *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975), this Court illustrated the profound territorial nature of tribal sovereignty, finding that if the lands in question were within a "continuing 'reservation,' jurisdiction is in the tribe and the Federal Government" but if the lands were "not within a continuing reservation, jurisdiction is in the State," except for Indian allotments. The intensity of battles over disestablishment and diminishment itself affirms the recognition of tribal sovereignty as confined to reservations or "Indian country."

Off reservation, in contrast, there simply is no tradition of tribal sovereignty and this Court's preemption jurisprudence reflects that singularly important fact. In

Mescalero Apache Tribe, 411 U.S. at 146, the tribe operated a ski resort immediately adjacent to, but outside, the boundaries of its reservation. The question was raised whether federal law had preempted the state's right to "impose a tax on the gross receipts of the [off reservation] ski resort." *Id.* The Court found that federal law raised no such bar: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49. The Court continued that the "principle is as relevant to a State's tax laws as it is to state criminal laws . . . and applies as much to tribal ski resorts as it does to fishing enterprises." 411 U.S. at 149.

The Court emphasized that there was no heightened scrutiny of off reservation transactions merely because an Indian tribe was involved and that normal preemption rules applied. The Court stated that if "'Congress intends to prevent the State . . . from levying a general nondiscriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion can not rest on dubious inferences.'" 411 U.S. at 156 (*quoting Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606-607 (1943)).

Mescalero Apache Tribe precludes arguments such as those relied upon by the Tenth Circuit. The tribal ski resort was adjacent to the reservation and undoubtedly supplied income to the reservation. The diminishment of the income to the reservation by virtue of the state taxation was irrelevant to the analysis of the Court which required, as a prerequisite to preemption "express federal law to the contrary." 411 U.S. at 148. The Tenth Circuit analysis, which relies almost exclusively on a reduction of

income to the tribe as a result of the off reservation transaction to justify its implicit repudiation of *Mescalero Apache Tribe*, is thus misguided.

Mescalero Apache Tribe remains good law. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 (1995); *White Mountain Apache Tribe*, 448 U.S. at 144 n.11. None of this Court's decisions, moreover, have undermined the doctrinal basis for an "express federal law" requirement for preemption off reservation as opposed to the application of a more nuanced test on reservation. There has been no undermining of the critical "territorial component" of tribal sovereignty which is argued to justify the more nuanced test on reservation but which cannot conceivably justify the application of such an analysis *off* reservation, where there is no "tradition of Indian sovereignty." *White Mountain Apache Tribe*, 448 U.S. at 143.

II. THE ABANDONMENT OF THE RULE OF PREEMPTION SET OUT IN *MESCALERO APACHE TRIBE* WOULD HAVE THE EFFECT OF SUBJECTING ANY STATE REGULATION APPLIED OFF RESERVATION TO THE *WHITE MOUNTAIN APACHE TRIBE* TEST.

The Tenth Circuit's decision should be rejected by this Court not only because of its adverse effect on the states' taxing powers, but also because of its potential adverse effect on the states' regulatory powers. *See generally Nevada v. Hicks*, 533 U.S. 353, 362 (2001) (recognizing applicability of *White Mountain Apache Tribe* rule in non-tax controversies on reservation). Indeed, the Tenth Circuit has already applied its approach repudiating the "express federal law" requirement of *Mescalero Apache*

Tribe to a non-tax matter. In *Prairie Band Potawatomi Nation v. Wagnon*, 402 F.3d 1015 (10th Cir. 2005), the Tenth Circuit found a state law requiring the tribe and tribal members to have state motor vehicle registrations and titles off reservation to be preempted. *Wagnon*, which was written by the same circuit judge who wrote the case now before this Court, explicitly rejects the traditional reading of *Mescalero Apache Tribe* that "absent express federal law to the contrary," Indians and Indian tribes are subject to nondiscriminatory state law when beyond the bounds of the reservation.

Although *Wagnon* does not specifically rely on *Richards*, the opinion does provide some further explanation of the scope of the Tenth Circuit's abandonment of the rule of *Mescalero Apache Tribe*. According to *Wagnon*, the rule is *not* that Indians going beyond reservation boundaries are subject to nondiscriminatory state laws "absent express federal law to the contrary" (*Mescalero Apache Tribe*, 411 U.S. at 148-49); rather, it is that "when state interests are secondarily affected," there is no requirement of "express federal law" for preemption and the nuanced balancing test of *White Mountain Apache Tribe* applies. *Wagnon*, 402 F.3d at 1023.*

The potential impact of the Tenth Circuit's repudiation of the rule of *Mescalero Apache Tribe* requiring "express federal law" as a prerequisite to off reservation

* The Tenth Circuit's negation of the rule of *Mescalero Apache Tribe* regarding "Indians going beyond reservation boundaries" and the requirement of no "express federal law to the contrary" was deemed required by an earlier decision in this litigation. *See Prairie Band Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1255 (10th Cir. 2001), cited at *Wagnon*, 402 F.3d at 1020.

preemption is startling. Whenever a tribe can claim an interest in an off reservation transaction, even one between two non-Indians (as in the case now before this Court), or whenever a tribe enacts an ordinance which conflicts with state law off reservation, a federal court may be called upon to examine the state law, and assess and weigh the "normative values" asserted by the state and tribe, one against the other. *See Wagnon*, 402 F.3d at 1025.

Wagnon presents the most obvious example of the next step in federal court involvement in the day-to-day governance of the states. Under *Wagnon,* presumably, federal courts may find that *no* state can deny the validity of *any* vehicle registration system adopted by any of the nation's 300 plus reservations or, perhaps, by any of the nation's 500 plus tribes. The impact on the states' ability to trace stolen or lost vehicles would be gravely damaged by such a result. Similarly, a state would no doubt be subject to federal litigation were it to enforce its driver's licensing laws with regard to a truck driver licensed by a tribe, even if the system adopted by the tribe was, in the view of the state, wholly insufficient. A routine purchase of office supplies or equipment for a casino by a tribe off reservation would, under the Tenth Circuit approach, presumably subject the states to a federal court battle.

The continued expansion of tribal casinos and other off reservation tribal business endeavors ensures that, if this Court were to adopt the Tenth Circuit's rule, the consequences on state taxing and regulatory authority would be significant. It is a virtual certainty that tribes will dramatically increase their off reservation business activities in the not distant future. Tribal revenues from gaming leaped from

$9.8 billion in 1999 to $18.5 billion in 2004. *See* Nat'l Indian Gaming Comm'n, Tribal Gaming Revenues, www.nigc.gov/nigc/tribes/tribaldata2003/july2003revenuept3.jsp; Nat'l Indian Gaming Association, *An Analysis of the Economic Impact of Indian Gaming in 2004* at 2. Tribal entities will seek to use these burgeoning revenues in the most profitable locations, and in many cases those locations are off reservation.

Even now, tribes are operating and investing in substantial projects off reservation. *See, e.g., An Analysis of the Economic Impact of Gaming in 2004* at 17-18; Harvard University, John F. Kennedy School of Government, "Economic Development Corporation: Ho-Chunk, Inc.," www.innovations.harvard.edu/awards.html?id=6409. (Winnebago tribal corporation recognized, inter alia, for utilizing tribe's "various economic and legal advantages" and for off reservation business investments in "Oregon, Colorado, Minnesota, Utah, Kansas, Oklahoma, Wisconsin, Texas and New Jersey.") Under the Tenth Circuit approach, should a tribe build a hotel in the heart of New York City, each health or safety regulation attempted to be imposed upon it by the city would be subject to a *White Mountain Apache Tribe* balancing test. The city's jurisdiction would be preempted, according to the Tenth Circuit, if a court, "assessing normative values to varying interests and weighing one against the other" (*Wagnon*, 402 F.3d at 1025) found that the regulation was "incompatible with and outweighed by the strong tribal and federal interests." *Prairie Band Potawatomi Nation v. Richards*, Pet. App. at 7. The probability of decisions adverse to the city would be enhanced by the Tenth Circuit's focus on the strength of the *tribe's* interest in revenue (*Id.* at 12) and its disinclination to seriously consider the effects on state revenue. *Id.*

at 13-14. The tribe could presumably argue that the hypothetical off reservation hotel complex would not have been built but for the on reservation gaming revenues and that, in fact, the off reservation hotel complex funnels customers into the on reservation gaming casino.

The decisions of the Tenth Circuit unjustifiably place a substantial weapon in the hands of any tribe with which to combat any local, off reservation regulation which the tribe understands or argues to be an impediment to a more profitable operation. A tribe will always have a lawsuit available with regard to its off reservation activity should the Tenth Circuit be affirmed. There is, however, nothing in the Constitution which allows federal courts to so broadly and comprehensively adjudge the acceptability of off reservation statutes adopted by the states on the basis of the federal court's understanding of the supposed "normative values" underlying such statutes. 402 F.3d at 1023.

In sum, *Richards* and the Tenth Circuit negation of *Mescalero Apache Tribe* pose a serious, and in many ways unprecedented, attack on the ability of states to act as states beyond the supervision, day-to-day, by the federal courts.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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